	OAH 15-3100-19983-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT VETERANS AFFAIRS

Gary F. Frahm, v. Independent School District No. 2859, Glencoe-Silver Lake.	**AMENDED FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION**

A hearing was held on January 22, 2009, at the Office of Administrative Hearings, before Beverly Jones Heydinger, Administrative Law Judge, pursuant to a Notice of Petition and Order for Hearing, dated October 22, 2008. On May 18, 2009, Findings of Fact, Conclusions and Recommendation (First Report) were issued, concluding that the School District had improperly denied the Petitioner the hearing required pursuant to Minn. Stat. § 197.46.[1] The First Report stated that the hearing record would be reopened to determine the compensation owing to the Petitioner, if any, that the School District owed the Petitioner from the date that his employment ended until the required hearing was held.

In subsequent communication, it was clarified that the reopened record would also address whether the Petitioner had engaged in misconduct justifying his termination from employment. The hearing to address the remaining issues was held on July 15, 2009.

Appearances: Bruce P. Grostephan, Peterson, Engberg & Peterson, on behalf of Gary F. Frahm (Petitioner); Patrick J. Flynn and Joseph E. Flynn, Knutson, Flynn & Deans, P.A., on behalf of Independent School District No. 2859, Glencoe-Silver Lake (School District).

The hearing record closed upon the receipt of the Petitioner's posthearing reply brief on September 1, 2009.

[1] Unless otherwise noted, the Minnesota Statutes are cited to the 2008 edition.

STATEMENT OF THE ISSUES

1. Is the Petitioner entitled to notice of his right to a veterans preference hearing prior to his termination from employment with the School District?

2. Did the Petitioner engage in misconduct that justified discharging him from his position as a school bus driver?

3. Should the Petitioner receive compensation for lost wages?

The Administrative Law Judge concludes that the Petitioner was denied his right to a hearing under the Veterans Preference Act. The Petitioner was absent from his position as a bus driver without permission but under the circumstances the misconduct did not warrant discharge. The Petitioner is entitled to recover the compensation that was lost as a result of the School District's failure to provide the Petitioner with a veterans preference hearing.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Petitioner is a veteran of the United States Navy, honorably discharged on September 19, 1962. The Petitioner was employed by the School District as a bus driver for approximately 13 years.

2. During the school year, the Petitioner drove a route each school-day morning and afternoon, and also drove athletic and academic teams and for field trips. Some of the trips occurred in the summer before school began.[2] During the 2005-2006 school year, the Petitioner worked approximately 1,597 hours.[3] During the 2006-2007 school year, through April 2, 2007, the Petitioner worked approximately 1,077 hours.[4]

3. The School District authorized the Petitioner to take about 10 days of unpaid leave in March 2006.[5]

4. At a meeting on July 10, 2006, the School District's Board voted to award its transportation contract for 2006-2007 to Prairie Bus Services, also known as 4.0 School Services.[6] The Petitioner and the other bus drivers continued to be employees of the School District and subject to its collective bargaining agreement, but the bus drivers were under the direct supervision of Mike Hennek, the owner of 4.0 School Services, and his manager, Bob Becker.[7]

---

[2] Testimony (Test). of Gary Frahm (1/22/09), at 4-5.
[3] Petitioner's Exhibit (P. Ex.) 8.
[4] P. Ex. 9.
[5] Respondent's Exhibit (R. Ex.) 10; Test. of Frahm (1/22/09) at 15.
[6] R. Ex. 21.
[7] Test. of Pamela Twiss (1/22/09) at 8.

5. Throughout the 2006-2007 school year, the School District and the Service Employees International Union, Local 284 (Union), were in negotiations about the school bus drivers. As part of its effort to privatize its bus transportation, the School District wanted to terminate the bus drivers from its employment. The bus drivers were offered the opportunity to terminate their employment with the School District in December 2006, but the Union objected, and the bus drivers remained School District employees throughout the school year.[8]

6. In September 2006, Petitioner mentioned to Mr. Hennek or Mr. Becker that he wanted to take vacation for a couple of weeks in March 2007. Either Mr. Hennek or Mr. Becker told the Petitioner that the request could probably be granted, but it would require the approval of the School District Superintendent, John Hurnung.[9]

7. In February 2007, Petitioner submitted his request for 13 days of leave in March to the Superintendent. Mr. Hornung denied the request.[10] The Petitioner was led to believe that Mr. Hornung was concerned about finding adequate substitutes for the Petitioner.[11] The Petitioner and Mr. Becker arranged for substitutes to cover the Petitioner's routes during his requested absence.[12]

8. On March 7, 2007, Petitioner obtained Mr. Becker's approval and resubmitted the leave request to the Superintendent, requesting 11 days of leave. The Petitioner clarified on the request that he planned to attend the 50-year reunion of the men who served on the U.S.S. Tombigbee and to visit his son. The Superintendent denied the request.[13]

9. Prior to leaving on vacation, the Petitioner left a message for Pamela Twiss, the Union business agent, raising concerns about his treatment and about being disciplined if he left on vacation.[14] Ms. Twiss did not conclude from the message that the Petitioner voluntarily quit his job.[15]

10. The Petitioner's last day of work before leaving on vacation was March 16, 2007. On that day, he told Mr. Becker that it was his last day and that he was going on vacation.[16] Mr. Becker sent a note to the School District office reporting that the Petitioner had stated that March 16 would be his last day working for the School District, and that Mr. Becker had told the Petitioner to submit a letter to the school administration stating his intent to resign.[17] The Petitioner did not submit a letter of resignation.

---

[8] *See* P. Ex. 18; R. Ex. 8.
[9] Test. of Frahm (1/22/09) at 11; R. Ex. 1 at transcript pages 29-31, 87-88.
[10] R. Ex. 4.
[11] Test. of Frahm (1/22/09) at 16.
[12] Test. of Frahm (1/22/09) at 16-17.
[13] R. Ex. 5.
[14] Test. of Twiss (1/22/09) at 24, 32.
[15] Test. of Twiss (1/22/09) at 28.
[16] Test. of Frahm (1/22/09) at 51-52; R. Ex. 1, transcript at 40 (Becker).
[17] R. Ex. 6.

11. Ms. Twiss confirmed that there was a long-standing history of the bus drivers receiving unpaid vacation, with the approval of the supervisor and the School District.[18] Although she acknowledged that bus drivers had typically been denied paid vacation, there had been a cooperative approach to approving unpaid leave.[19] Ms. Twiss's opinion was that the Superintendent denied the Petitioner's request for leave because of the on-going dispute between the School District and the Union over the School District's attempt to privatize the bus transportation.[20]

12. The Petitioner was absent for eight work days and returned to work on April 2, 2007, but was not permitted to resume his duties.[21] There was no school in the district from April 5-9, 2007.[22]

13. 4.0 School Services offered to hire Petitioner as its employee to drive for the School District. The Petitioner accepted and drove the bus routes on April 10, 2007. On April 11, after driving the morning route, Mr. Becker called the Petitioner and told him not to take the afternoon route and to come into the office for a meeting. Mr. Becker told the Petitioner that Mr. Hornung was upset and did not want 4.0 School Services to employ the Petitioner. To avoid a dispute with the Superintendent, 4.0 School Services terminated the Petitioner.[23]

14. The School District did not pay the Petitioner for work after March 16, 2007.[24]

15. There was no evidence in this proceeding that the Petitioner's competence as a bus driver was at issue. At the arbitration proceeding, both Mr. Becker and Mr. Hennek confirmed that the Petitioner was a very good bus driver.[25]

16. After the Superintendent denied the Petitioner the right to return to work, the Petitioner requested retirement, fearing that he would lose the public pension which he believed he should receive. He submitted a slip to the School District, backdated to March 16, 2007. On or about April 5, 2007, the Superintendent denied the Petitioner's request for retirement on the basis that the Petitioner had previously quit.[26]

17. On or about April 11, 2007, the Union submitted a grievance on behalf of the Petitioner but the Superintendent would not accept it on the basis that the Petitioner

---

[18] Test. of Twiss (1/22/09) at 30.
[19] Test. of Twiss (1/22/09) at 31.
[20] Test. of Twiss (1/22/09) at 32. *See also* P. Ex. 13.
[21] Test. of Frahm (1/22/09) at 19; R. Ex. 1, transcript at 151. R. Ex. 7 shows that there were eight school days during the Petitioner's absence.
[22] R. Ex. 7.
[23] Test. of Frahm (1/22/09) at 21-22; Test. of Frahm (7/15/09) at 31; R. Ex. 1 at transcript pages 44, 49, 54, 80-81 (Becker); 156-57 (Hornung).
[24] Test. of Frahm (1/22/09) at 27 (statement of School District counsel).
[25] R. Ex. 1 at transcript pages 54-55, 105, 154-155.
[26] P. Ex. 20 (including copy of post-it note between School District staff from Dawn Peterson to Carol Dammann); Test. of Twiss (1/22/09) at 10; Test. of Frahm (1/22/09) at 24-25.

was no longer employed by the School District. A second request was sent on April 19, 2007, and denied in a letter to the union representative from the Superintendent.[27]

18. On April 24, 2007, the Union requested a veterans preference hearing for the Petitioner, enclosing a copy of Petitioner's honorable discharge papers.[28] No veterans preference hearing was held.

19. On May 21, 2007, the Union requested arbitration.[29] On March 27, 2008, the arbitrator issued a decision, determining that Petitioner had quit his employment, denying the grievance, and stating that the Petitioner's veterans preference claim was outside the scope of the arbitration.[30]

20. On August 1, 2007, the Petitioner began to draw PERA benefits.[31] He continued to seek employment driving a bus, and was employed part-time by several different companies.[32]

21. On August 7, 2008, the School Board passed a resolution finalizing the subcontracting of bus services and laying off the bus drivers.[33] The new superintendent, Christopher Sonju, sent a copy of the School Board's resolution to each of the bus drivers, notifying them of their immediate layoff, of their option to accept employment with 4.0 School Services and their eligibility for severance benefits. Each bus driver was given until August 18, 2008, to accept the offer of employment with 4.0 School Services.[34] No notice was sent to the Petitioner.

22. The School District and the Union entered into a Memorandum of Understanding dated February 27, 2009, to resolve the dispute between the School District and the bus drivers. Among its terms, it addressed the amount of severance the bus drivers would receive. The Union and the bus drivers agreed to dismiss with prejudice any grievances or claims against the School District related to the subcontracting of the bus services. Paragraph 9 of the Memorandum of Understanding stated: "The School District acknowledges that this agreement has no effect upon the Veteran's rights claim of former bus driver Gary Frahm."[35]

23. The Petitioner was not offered a position with 4.0 School Services nor did he apply for one following the decision of the School District to lay off its bus drivers.[36]

24. The Petitioner's average monthly wage from April 2007 through July 2009 was $1,752.75, plus a stipend of $60 per month paid in lieu of health insurance, a total

[27] P. Exs. 10, 21, 22.
[28] R. Ex. 11.
[29] R. Ex. 18.
[30] R. Ex. 26 at 10.
[31] P. Ex. 32.
[32] P. Ex. 31.
[33] P. Ex. 18.
[34] P. Ex. 36.
[35] P. Ex. 35.
[36] Test. of Frahm (7/15/09) at 57-78.

of $1,812.75 per month.[37] At that rate, the Petitioner's total compensation for April 2007 through September 2009 would have been $54,382.50.[38] The Petitioner is entitled to interest under Minn. Stat. § 334.01, subd. 1, of 6 percent per year, not compounded, on the compensation owing. The total interest owing for April 2007 through September 2009 is $3,941.10.[39]

25. The amount of compensation owing is offset by the wages earned. The parties are largely in agreement on this issue with the exception of the amounts paid to the Petitioner by Tri Valley Opportunity Council (Tri Valley). The Petitioner omitted these amounts from the wage set-off because he contended that he earned the money in the summer when he was not driving for the School District and the income supplemented his wages from the School District. The pay records for 2006 were consistent, and the Petitioner properly omitted this amount from the offset. However, in 2007, the Petitioner's earnings from Tri Valley continued into October.[40] For this period, the amount that the Petitioner earned that would have exceeded his wages from the School District could not be determined. Thus, the entire amount of the earnings from Tri Valley for 2007, as well as for 2008 and 2009, were included in the wages offset against the compensation owing. The total wages to be offset are $14,266.56.

26. If the Petitioner had retained employment with the School District to 2009, he would have accumulated 15 years of service and been eligible for severance pay.[41] Based on the terms of the collective bargaining agreement and a rate of $14.96 per hour, the Petitioner would have qualified for $3,554.50 for severance pay tied to sick time and $239.36 for personal leave days.[42] The record is unclear about the amount that the Petitioner would have been offered in severance had he been considered eligible in March 2009 when the union and the School District reached an agreement on the amount of severance for the other bus drivers.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department of Veterans Affairs and the Administrative Law Judge have jurisdiction to consider whether a petitioner has the right to a hearing under the Veterans Preference Act prior to discharge from employment, whether there was a proper basis for the School District to terminate the Petitioner's employment, and whether any back wages are owing to the Petitioner, pursuant to Minn. Stat. § 197.481 and § 14.50.

[37] *See* Ex. 30; Brief of Petitioner Gary F. Frahm at 15; Respondent's Post-Hearing Brief at 23.
[38] $1,752.75 x 30 months = $52,582.50; $60 x 30 months = $1,800.00. Total = $54,382.50
[39] Based on the formula of N(N-1) x $9.06/2, where N is 30 months, = $3,941.10.
[40] Test. of Frahm (7/15/09) at 51-53.
[41] Test. of Frahm (7/15/09) at 46.
[42] Ex. 38.

2. The Department of Veterans Affairs has complied with all relevant procedural requirements and has given proper notice of the hearing.

3. Because the School District has raised the affirmative defense that Petitioner resigned, it bears the burden of demonstrating by a preponderance of the evidence that the Petitioner, a veteran, was not entitled to notice of his right to a hearing under the Veterans Preference Act prior to termination of his employment. Pursuant to Minn. Stat. § 197.46, "Any veteran who has been notified of the intent to discharge the veteran from … employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge."

4. A veteran who voluntarily quits or relinquishes employment is not considered to be "discharged" and is not entitled to the notice of right to request a hearing.[43]

5. A resignation occurs when an employee abandons his employment by leaving the position with no intent to return to it and his actions are consistent with his intent. [44]

6. The School District has failed to show by a preponderance of the evidence that the Petitioner resigned from his position. It failed to show by a preponderance of the evidence that the Petitioner left his position without the intention of returning, that he gave notice of his resignation, or that he acted in any way consistent with resignation.

7. The School District's failure to give notice to the Petitioner of his right to request a hearing violated the Veterans Preference Act.

8. The Petitioner is entitled to the wages he would have earned between the date of wrongful discharge and the date that he was formally discharged in accordance with his rights under the Veterans Preference Act.[45]

9. A veteran may be dismissed from employment for misconduct. One must evaluate the veteran's conduct, competency and fitness for the job, and the effect on the work place. There must be substantial reasons to support discharge.[46]

10. The Administrative Law Judge has the authority to modify the discipline imposed on the veteran if there are extenuating circumstances that demonstrate that discharge was unwarranted.[47] The Petitioner has demonstrated that under the circumstances presented, discharging the Petitioner from his position was not

---

[43] *Brula v. St. Louis County*, 587 N.W.2d 859, 862 (Minn. App. 1999).
[44] *Seacrist v. City of Cottage Grove,* 344 N.W.2d 889, 891 (Minn. App. 1984); *Anson v. Fisher Amusement Corp.,* 254 Minn. 93, 98, 93 N.W.2d 815, 819 (1958).
[45] *Pawelk v. Camden Township*, 415 N.W. 2d 47 (Minn. App. 1987): *Bolden v. Hennepin County Board of Commissioners*, 504 N.W. 2d 276 (Minn. App. 1993).
[46] *Leininger v. City of Bloomington*, 299 N.W. 723, 726 (Minn. 1980).
[47] *Southern Minnesota Municipal Power Agency v. Schrader,* 394 N.W.2d 796, 802 (Minn. 1986), *reh. denied* (Nov. 21, 1986).

warranted. A thirty-day suspension without pay is sufficient to discipline the Petitioner for absence without approval.

11. The Petitioner is entitled to reinstatement to his position with the School District. He is entitled to his wages and other compensation as if he had held the position consistently through the date of the Commissioner's Order.

12. The School District has demonstrated that the position of bus driver was eliminated by the School District in August 2008. The Petitioner is entitled to the same benefits as the other bus drivers employed by the School District at that time, including severance and the opportunity to accept a position as a bus driver with 4.0 School Services.

13. The Petitioner is not entitled to an award of attorneys fees under the Veterans Preference Act or the Equal Access to Justice Act.[48]

14. Any Findings of Fact more properly designated Conclusions are adopted as such.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED THAT:

1. The School District's decision to terminate the Petitioner's position as a school bus driver without conducting a veterans preference hearing be REVERSED.

2. The School District reinstate the Petitioner to his position through the date of the Commissioner's Order.

3. The School District pay the Petitioner $42,304.29, to compensate him for lost wages and stipend ($54,382.50), with interest ($3,941.10), from April 2007 through September 2009, minus wages for one month of suspension without pay ($1,752.75), and minus wages earned during the period from April 2007 through July 2009 ($14,266.56).

4 The School District pay the Petitioner severance in the amount of $3,793.86, as set forth in Petitioner's Exhibit 38, or the amount he would have been eligible to receive if severance were calculated under the terms agreed upon with the union, as set forth in Petitioner's Exhibit 35, whichever is greater.

5. The School District notify 4.0 School Services that it has no objection to the Petitioner's employment and will not interfere with the assignment of Petitioner to a bus route.

[48] Minn. Stat. §§ 15.471-15.474; §§ 197.46 -197.481.

6. The School District notify PERA of the outcome of this proceeding so that it can make any appropriate adjustments to the Petitioner's benefits to reflect additional compensation and length of service.

7. The Petitioner's request for attorneys fees be denied.

Dated: September 23, 2009

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Digitally Recorded
A-bjh-012209
A-bjh-07152009
Transcribed in part

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make a final decision after a review of the record. The Commissioner may adopt, reject, or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Clark Dyrud, Commissioner of Veterans Affairs, State Veterans Service Building, 20 West 12th Street, Room 206C, St. Paul, Minnesota 55155-2006, to learn the procedure for filing exceptions or presenting argument. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final decision of that agency under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioners, or upon expiration of the deadline for doing so. The Commissioners must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the Commissioners are required to serve their final decisions upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Right to Hearing

The parties do not dispute that the Petitioner was an honorably discharged veteran who was employed by the School District for several years. Thus, he was entitled to the rights conferred under the Veterans Preference Act. It is also not disputed that the School District denied the Petitioner a hearing under the Veterans Preference Act based on its position that the Petitioner had resigned from his job as a bus driver. A veteran who resigns or retires from his position is not "removed" from the position and is not entitled to notice of his right to a hearing under the Act.[49]

The School District asserts that the Petitioner was not entitled to a hearing because he effectively resigned by failing to report for work for eight days without approval. The Petitioner does not deny that he took vacation without the School District's approval, but he insists that he did not abandon his position and did not intend to resign. He claims that he was entitled to a veterans preference hearing to raise the question of whether the School District had good cause to terminate his employment.

One must analyze the facts to determine whether the Petitioner voluntarily relinquished or abandoned his job on March 16, 2007, or whether he took vacation with the knowledge that it had been disapproved, but with the intent of returning to work.

The parties dispute exactly what the Petitioner said on March 16, 2007. The Petitioner claims that he told Mr. Becker that he was leaving on vacation and that it was his last day, to clearly convey that the substitute would need to take over the routes on the next school day. The Petitioner claims that he did not intend to convey that he was quitting for good. Mr. Becker apparently interpreted the Petitioner's statements to mean that he was resigning. Mr. Becker directed the Petitioner to put his resignation in writing, but the Petitioner did not do so until after he was denied the opportunity to return to employment.

Ms. Twiss did not interpret the Petitioner's message to her as a resignation. Instead, she understood that the Petitioner was concerned about the discipline he might face when he returned.

The Petitioner acknowledged that he had told a member of the School Board, Glen Gruenhagen, that he would quit if he could not get vacation, but that he did so because he was angry about the situation and the on-going dispute with the bus drivers.[50]

The Petitioner returned to work on April 2, 2007, three days prior to the leave that he requested, knowing that his leave request had been disapproved. When he returned, the Superintendent would not let him work. Immediately thereafter, 4.0 School Services hired the Petitioner to drive the bus routes. School was out on April 5 through

[49] *Brula v. St. Louis County*, 587 N.W.2d 859, 862 (Minn. App. 1999).
[50] Test. of Frahm (1/22/09) at 58-59.

9; the Petitioner reported for work on April 10, and drove his assigned routes until the Superintendent pressured 4.0 School Services to fire him on April 11, 2007.

An employee voluntarily quits when he directly or indirectly exercises his choice to leave employment.[51] A resignation occurs when an employee abandons his employment. One must look for the intent to abandon, some act of abandonment and evidence that the surrender of the position was voluntary. Whether these three elements exist in a particular case is a question of fact.[52] The facts in this case do not support a conclusion that the Petitioner abandoned his position.

In *State ex rel. McCarthy v. Civil Service Comm'n of Minneapolis,*[53] the Supreme Court considered facts similar to those presented here. A Minneapolis employee took vacation on July 6 and was scheduled to return on July 14. He did not return to work until July 20. On July 19, the City informed the veteran that absence for more than three days without approval constituted resignation under the civil service rules.[54] The Civil Service Commission determined that the City had good cause to remove the veteran for misconduct. An Appeal was taken to the district court. The district court held that the veteran had not abandoned his position, and that he was entitled to a hearing under the Veterans Preference Act to challenge the City's discharge and to be paid his wages and benefits until the hearing was held. It affirmed the Commission's determination that the veteran had committed misconduct. The City did not appeal the portion of the trial court's order requiring that the discharge could not be effective until the veterans preference hearing was held, and the district court agreed that the veteran was entitled to receive his wages until the discharge was effective.[55]

In contrast, in *Tharalson v. Bloomington Independent School District No. 27,*[56] the Court of Appeals in an unpublished opinion upheld the Commissioner's decision approving discharge of a veteran who had taken an approved leave from his position as a bus driver but failed to contact the school district when he returned or to reply to several inquiries from the district about his intent to return to work. After several months, the district notified the veteran that it would recommend that the school board accept his voluntary resignation. At that point, the veteran objected and requested a hearing. The Commissioner concluded that the veteran was not entitled to a veterans preference hearing because his failure to report to work or maintain contact for several months constituted resignation from the position. The Court of Appeals agreed that the veteran failed to take reasonable steps to retain employment and that the veteran's decision not to return was his alone, and was not induced by the district.[57]

---

[51] *Seacrist v. City of Cottage Grove,* 344 N.W.2d 889, 891 (Minn. App. 1984); *Anson v. Fisher Amusement Corp.,* 254 Minn. 93, 98, 93 N.W.2d 815, 819 (1958).
[52] *State ex rel. Young v. Ladeen,* 104 Minn. 252, 116 N.W. 486, 487 (Minn. 1908).
[53] 152 N.W.2d 462 (Minn. 1967).
[54] The Civil Service Commission Rule 9.03 stated that the absence of an employee for three successive days or longer without leave or notice to his superior shall be considered resignation. *Id.* at 463.
[55] *Id. at* 464.
[56] C1-02-2218, (Minn. App. June 17, 2003).
[57] *See also Brula v. St. Louis County, supra* (veteran with post traumatic stress disorder failed to report to work; absence not attributable to the employer).

It is noteworthy that, in the present case, there is no provision in the collective bargaining agreement that states that failure to report for work without permission or notice to the employer constitutes resignation. The specific act that the School District relies upon as the basis for the resignation is the failure to report to work. But under these facts, where the Petitioner gave notice of his absence, was assured that there was a substitute, and returned to his position earlier than expected, there was not a clear act of abandonment. Absence without permission may be a basis for employee discipline, but under these facts, it is not clear evidence of resignation.

The School District relied upon Mr. Becker's understanding of the Petitioner's intent to quit as its basis for concluding that the Petitioner had quit. However, Mr. Becker told the Petitioner to put his request to retire in writing, and the Petitioner did not do so. In light of the Petitioner's plan to be absent, his statement was ambiguous. The Petitioner's explanation that he was simply conveying to Mr. Becker that he would be leaving on vacation was consistent with his actions. The School District should have acknowledged the misunderstanding when the Petitioner reported for work immediately upon returning from his vacation.

The School District also claims that the Petitioner's application for PERA benefits reflected his intention to resign. However, he did not apply for the benefits until after he was denied the opportunity to return to work. The timing of the application supports the Petitioner's testimony that he applied for PERA because he could not return to work.

In *Johnson v. County of Anoka*,[58] the Court of Appeals emphasized that the veteran's resignation must be voluntary. In that case, an employee was having difficulty adapting to a new computer system. After some time, the employer gave the employee the choice to resign or to be terminated, telling him that it would be in his best interest to resign and that he would be given a good recommendation. The employee was given 24 hours to make a decision. The employee resigned and was not given notice of his veterans preference rights. Years later, he learned of those rights and attempted to exercise them. The court dismissed the matter on the basis of the statute of limitations, but stated, in *dicta*, that there was substantial support for the employee's claim that the choice given to him was tantamount to being removed from employment, that the effect of the employer's action was to make it unlikely that the veteran would be able to continue in the job, and that he should have been given notice of his rights under the Veterans Preference Act.

The School District had the opportunity to minimize its potential liability when it became obvious that the Petitioner did not agree that he had resigned. If the School District had reason to terminate the Petitioner for failure to report to work, it could have immediately provided him with notice of its intent to discharge him, accompanied by notice of his right to a veterans preference hearing. Although the School District knew that the Petitioner disagreed with its position, it did not take steps to assure that the Petitioner received his rights under the Veterans Preference Act.

[58] 536 N.W.2d 336 (Minn. App. 1995), *rev. denied*, Sept. 28, 1995.

Discharge for Misconduct Was Not Warranted

In a recent Order, the Commissioner of Veterans Affairs has clarified that, when an Administrative Law Judge (ALJ) determines that the employer improperly denied the veteran the right to a hearing, the ALJ should go forward and determine whether there were sufficient grounds for a discharge and what, if any, relief is appropriate.[59]

An employee who is a veteran cannot be dismissed except for "incompetency or misconduct."[60] The School District conceded that the Petitioner is competent. Thus it must show that the Petitioner could be discharged for misconduct. The Supreme Court has held that "misconduct" should be evaluated under the same standard as dismissal for "just cause."[61] It may not be any cause that the employer deems sufficient but must relate to and affect the performance of the position and be sufficiently substantial that it directly affects the rights and interest of the public. Absent any statutory specification, "the sufficiency of the cause should be determined with reference to the character of the office, and the qualifications necessary to fill it."[62] The dismissal must relate to the manner in which the employee performs his duties, and the reasons must be substantial.[63] One must consider "the veteran's conduct, the effect upon the workplace and work environment, and the effect upon the veteran's competency and fitness for the job."[64]

In conducting a veterans preference hearing, the task is twofold: first, to determine whether the employer has acted reasonably; second to determine whether extenuating circumstances exist justifying a modification in the disciplinary sanction. The purpose of the veterans preference hearing is not simply to review findings and approve or disapprove recommendations concerning the appropriate sanction, but to decide based on the evidence what penalty, if any, is justified. The power to modify the proposed discipline is consistent with granting the veteran a meaningful hearing, and to assure that there was not an arbitrary abuse of power.[65] The veteran must have the opportunity to show whether there were any extenuating circumstances that should have weighed into the School District's decision to terminate the Petitioner.[66]

An employee may be entitled to a hearing under both the collective bargaining agreement under which he is employed and the Veterans Preference Act. Minnesota courts have held that, although conducting two proceedings may be inefficient and could lead to conflicting results, the law dictates that a veteran is entitled to both

---

[59] *See Sandven v. Redwood County,* OAH Docket No. 43-3100-19712, Order of the Commissioner, December 9, 2008.
[60] Minn. Stat. § 197.46.
[61] *Leininger v. City of Bloomington*, 299 N.W. 723, 726 (Minn. 1980); *Ekstedt v. Village of New Hope*, 292 Minn. 152, 193 N.W.2d 821 (1972).
[62] *Leininger, supra,* at 726.
[63] *Id.*
[64] *Southern Minnesota Municipal Power Agency v. Schrader,* 394 N.W.2d 796, 802 (Minn. 1986), *reh. denied* (Nov. 21, 1986).
[65] *Id.,* at 800-01 (Minn. 1986); *AFSCME Council 96 v. Arrowhead Regional Corrections Board,* 356 N.W.2d 295, 298 (Minn. 1984).
[66] *Garavalia v. City of Stillwater,* 283 Minn. 335, 346, 168 N.W.2d 336, 344 (1969).

proceedings. In *AFSCME Council 96 v. Arrowhead Regional Corrections Board*,[67] the Supreme Court stated: "There are practical as well as statutory and public policy reasons for allowing a veteran to employ both avenues of redress. The veteran who requests a preference hearing must either be suspended with pay or be allowed to continue in employment until after the hearing. The arbitration process provides no such umbrella."[68] It further elaborated upon the reasons a veteran may choose to proceed in one forum or the other, recognizing that the two proceedings may lead to inconsistent results. Moreover, as the Supreme Court pointed out, the two proceedings have different standards of review on appeal.[69]

In this instance, the arbitrator concluded that the Petitioner had effectively resigned by taking leave without permission. Yet the standard applied by the arbitrator to determine that the Petitioner resigned is not applicable to this proceeding, and the evidence was not sufficient to demonstrate that, under the standard set forth in the Veterans Preference Act, the Petitioner had resigned. Thus, at this stage, one must review the Petitioner's actions to determine whether the School District would have had a sufficient basis to discharge the Petitioner for failing to report to work.

The Petitioner took vacation knowing that his request for leave had been denied. That is not a reasonable action for an employee to take, and discipline was certainly warranted. Attendance is an important obligation of each employee and an unapproved absence is not to be excused.

Yet under the circumstances presented here, it is clear that discharge was too harsh a penalty to impose for the Petitioner's absence from work. Consideration of the appropriate sanction is consistent with granting the veteran a meaningful hearing.[70]

The Petitioner argued that discharge was not reasonable because he was entitled to paid vacation under the terms of the collective bargaining agreement.[71] However, that right was clearly disputed and the union representative testified that the contract had not been interpreted to provide paid vacation to the bus drivers. Since interpretation of the contract is disputed, and the evidence showed that bus drivers did not receive paid leave, there is insufficient evidence to find that the Petitioner was entitled to receive paid vacation.

However, there are several other circumstances that support a less severe form of discipline. The Petitioner had an exemplary work record, he was acknowledged to be an excellent bus driver, and there was no evidence of any prior discipline. The Petitioner's failure to report to work without permission was a single instance of insubordination.

---

[67] 356 N.W.2d 295 (Minn. 1984).
[68] *Id.,* at 298.
[69] *Id., at* 298-299.
[70] *Southern Minnesota Municipal Power Agency v. Schrader*, 394 N.W.2d 796, 800-802 (Minn. 1986), *reh. denied,* Nov. 21, 1986.
[71] P. Ex. 1 at Art. XIII, §2, subd. 2.

Also, the Petitioner provided advance notice of his absence and had his direct supervisor's approval and assurance that a replacement driver had been arranged. There was no evidence that the School District's operation, including the safe transportation of the school children, was compromised or disrupted by the Petitioner's action.

Nothing in the collective bargaining agreement between the Union and the School District stated what discipline, if any, would be imposed for an unexcused absence, nor had the School District previously taken disciplinary action against an employee for an unexcused absence.[72] Although progressive discipline is not required in every instance, and serious misconduct may warrant discharge, the facts presented here do not support such a severe sanction.

Although of less significance, there were three other extenuating circumstances. The School District's past practice had been to grant unpaid leave to its bus drivers. As Ms. Twiss stated, this practice was an accommodation for the drivers' ineligibility for paid vacation. The evidence showed that the School District had granted the Petitioner unpaid leave the prior year. Also, the on-going dispute between the union and the School District likely played a role in the Superintendent's decision to deny the Petitioner's request for leave. Although the Superintendent's public comments about the dispute are not relevant to the Petitioner's claim, they are indicative of the climate in which the Petitioner's request was considered.[73]

In addition, the School District interfered with the Petitioner seeking other employment. It is undisputed that 4.0 School Services offered the Petitioner a position that would have mitigated the effect of the School District's action and that the School District intervened and asked 4.0 School Services to terminate the Petitioner from its employment. Unwilling to anger the superintendent, 4.0 School Services agreed to do so.

In light of all the circumstances, discharge was too severe a sanction for the Petitioner's misconduct.

This case can be readily distinguished from the instances where a veteran's misconduct warranted discharge. For example, in *Wagner v. Minneapolis Public Schools, Special School District No. 1,*[74] the Supreme Court upheld the discharge of a custodian who gave children money to help him with his work, played tag with the children in a school building with lights off, had water fights with the children, invited them to play on the roof, and had grabbed children. In *Ramsey County Community Human Services Department v. Pablo Davila,*[75] several female employees complained

---

[72] *Compare McCarthy v. Civil Service Comm'n of Minneapolis,* 277 Minn. 358, 152 N.W.2d 462 (Minn. 1967) (civil service rule stated that an employee who failed to report to work for three consecutive days without permission, without notice of the reason for the absence and without clarifying his intent to return had, in effect, resigned).

[73] *See* Test. of Twiss (1/22/09) at 18-19, 32; *See also* Test. of Frahm (1/22/09) at 10-11.

[74] 569 N.W.2d 529 (Minn. 1997).

[75] 387 N.W. 2d 421 (Minn. 1986).

of sexual harassment by a human services supervisor. The Supreme Court upheld the County's decision to discharge the supervisor because the behavior was egregious and extended over a period of time.[76]

Some discipline is appropriate. Management is entitled to review and disapprove leave requests, although it may not exercise its right in an arbitrary manner. Under the collective bargaining agreement, the employee cannot unilaterally refuse to accept management's decision to deny a vacation, but, rather, is expected to file a grievance. Thus, it is important to impose discipline that is appropriate to the offense, both to assure that there is a consequence for the employee's action and to communicate to other employees that their unilateral actions may be subject to discipline. In this instance, because the Petitioner had no prior discipline and worked with his manager to assure that the School District had the help needed to cover his duties, a 30-day suspension without pay is appropriate. The amount of pay that the Petitioner would have earned during that suspension will be deducted from the compensation award.

This sanction may be compared with the discipline imposed in *Lewis v. Minneapolis Board of Education, Special School District #1.*[77] In that case, the Court of Appeals upheld the Civil Service Commission's decision to impose a 90-day suspension without pay for an employee who misused sick leave. The employee was a mechanic for the school district and held a second job as a truck driver. The employee took sick leave from his public employment because he claimed that the position was stressful and he needed a break, but, at the same time, he continued to work at his second job. The definition of sick leave required that the affliction be disabling to the degree that time away from work was recommended by a physician. The employee had a reputation for being honest and dependable and had no prior discipline. The Court found that the Commission's imposition of a 90-day suspension was reasonable and supported by substantial evidence.

Effect of the Subcontracting of the School Bus Services

In August 2008, during the pendency of this proceeding, the School District subcontracted all of its school bus services to 4.0 School Services and terminated the bus drivers' employment. Ordinarily, when the employer establishes at the veterans preference hearing that the position was abolished in good faith, the veteran is not entitled to back wages.[78] The School District argues that this principle should be applied here to limit the Petitioner's compensation to the period up to the lay-off of all the bus drivers. However, the School District did not give the Petitioner any notice that his position was abolished. Knowing that the Petitioner's case for reinstatement was pending, the School District could have given him notice that, should he prevail in his veterans preference hearing, his position was being abolished in 2008. It did not do so. Since the Veterans Preference Act requires that the Petitioner be paid through the date of the order addressing the alleged misconduct, and since the School District took no

[76] *See also, Tharalson, supra.*
[77] 408 N.W. 2d 905 (Minn. App. 1987)
[78] *Young v. City of Duluth,* 386 N.W. 2d 732, 738 (Minn. 1986); *Taylor v. City of New London,* 536 N.W. 2d 901, 905 (Minn. App. 1995), *rev. denied* (Minn. Oct. 27, 1995).

steps to limit its liability, it should be responsible for paying the Petitioner through the date of the Commissioner's Order.

The agreement between the School District and the Union awarded severance benefits to the bus drivers, regardless of whether they would have qualified for severance under the terms of the collective bargaining agreement, and also gave each bus driver the opportunity to accept employment with 4.0 School Services. Had the Petitioner been in his position at that time, he would have been the beneficiary of the agreement. In order to restore him to essentially the same position he would have been in had he not been improperly discharged, to the extent possible, the same opportunity must be given to him.

Restoring the Petitioner to His Position

The School District no longer employs bus drivers and is not in a position to require 4.0 School Services to hire the Petitioner. However, it should request that 4.0 School Services extend to the Petitioner the same employment offer given to the other bus drivers who were terminated. The School District should also notify 4.0 School Services that it does not object to the company hiring the Petitioner and will not interfere with the assignment of bus routes to him. So long as these conditions are met, the School District's obligation to restore the Petitioner to his position and to compensate the Petitioner should end after the Commissioner's Order is issued.

Compensation to the Petitioner

The Supreme Court has held that, where a veteran has been removed from his job without a veterans preference hearing, the veteran is entitled to "all continuing and accrued salary" from the day the veteran was removed until a decision has been made after a hearing.[79] The Petitioner is also entitled to interest calculated from the time each paycheck was due.[80] As addressed above, the exception precluding compensation when a position has been properly eliminated does not apply here.[81] Petitioner is entitled to the wages and benefits he would have received had he continued in his position through the date of the Commissioner's Order. The amount that is owing to the Petitioner must be reduced by the amount that the veteran earned, or with due diligence could have earned, in other employment.[82]

The parties have agreed upon the monthly wage, including a stipend paid to the Petitioner in lieu of health benefits, and the applicable rate of interest. The total amount due will be calculated from April 2007 through the date of the Commissioner's Order. The total should be offset by one month of wages to reflect a 30-day suspension without pay and the wages earned by the Petitioner since April 2007.

---

[79] *Myers v. City of Oakdale,* 409 N.W.2d 848, 853 (Minn. 1987).
[80] *Henry v. Metropolitan Waste Control Comm'n,* 401 N.W.2d 401, 407 (Minn. App. 1987).
[81] *Id.; Taylor v. City of New London,* 536 N.W. 2d 901, 905 (Minn. App. 1995), *rev. denied* (Minn. Oct. 27, 1995); *see also Young v. City of Duluth,* 386 N.W. 2d 732 (Minn. 1986).
[82] *Tombers v. City of Brooklyn Center,* 611 N.W.2d 24, 27-28 (Minn. App. 2000); *Pawelk v. Camden Township*, 415 N.W.2d 47, 51-42 (Minn. App. 1987*)* and cases cited therein.

There is little disagreement about the wage offsets for other employment, with the exception of a dispute about offsetting income from Tri Valley Opportunity Council. The offset for 2006 is not appropriate because the wages were earned prior to the Petitioner's discharge in 2007. It is less clear whether the 2007 payment should be offset because a portion of it was earned after the school year began. Since the Petitioner failed to demonstrate that the amount earned in 2007 would have supplemented his compensation from the School District, the Administrative has concluded that the 2007 wages from Tri Valley should be offset against the compensation owed. The Petitioner agreed that wages earned from Tri Valley in 2008 and 2009 should be offset.

The School District argues that, at any time after the subcontract was entered, the Petitioner could have applied for employment with 4.0 School Services to mitigate his damages. It stressed that there was a new superintendent and that 4.0 School Services operated bus routes for other districts. However, the School District never withdrew its objection to the Petitioner being hired. Since the School District had notified 4.0 School Services that the Petitioner was not acceptable to them, it is understandable that the Petitioner did not re-apply. There is no evidence that 4.0 School Services offered the Petitioner a position that he turned down. The School District has failed to make a compelling argument that the Petitioner's failure to seek employment from 4.0 School Services warrants reduction to his award of back pay.

The Petitioner is also entitled to severance pay. It is not clear how the severance was calculated for the bus drivers who were covered by the terms of Petitioner's Exhibit 35. It is appropriate to make that calculation and also to calculate the amount owing under the terms of the Collective Bargaining Agreement, as set forth in Petitioner's Exhibit 38. The Petitioner should receive the greater of the two amounts. In its Post-Hearing Brief, the School District argued that the Petitioner did not opt to be a party to the settlement between the School District and the Union.[83] However, since there was no evidence that the School District gave the Petitioner notice of the School Board's action or that a severance package was offered to the Petitioner, and in light of the School District's consistent position that the Petitioner was not an employee at the time the Memorandum of Agreement was signed, there is no evidence upon which one could conclude that he opted not to be a party to the settlement.

Although the School District contends that it would be double pay to give the Petitioner severance in addition to wages, that analysis is incorrect. Under the circumstances, because the positions have been eliminated, the Petitioner can no longer work as a bus driver and his employment with the School District must end. Severance is paid when employment terminates. The back wages are to compensate him for what he would have earned until such time as he was properly terminated.

Attorneys Fees

[83] Respondent's Post-Hearing Brief at 25-26.

In his Petition for Relief, the Petitioner requested that he be awarded his attorneys fees. Petitioner has failed to cite authority in support of his request. Litigants are not ordinarily entitled to recover attorneys fees, absent specific statutory authority to do so,[84] nor would the Petitioner be eligible for an award under the Minnesota Equal Access to Justice Act.[85] Accordingly, the Petitioner's request for attorney's fees is denied.

Notice to PERA

The parties agree that, because of the Petitioner's age, his PERA benefits are not an offset to the back wages. Pursuant to Minn. Stat. § 353.37, subd. 5, if a PERA recipient returns to public service after retirement, his annuity is neither increased nor decreased, and he is not required to make additional contributions to PERA. However, the School District should notify PERA of the outcome of this proceeding so that it can determine the application of the statute to the facts presented here.

B. J. H.

[84] *See, e.g., Grodzicki v. Quast*, 276 Minn. 34, 149 N.W.2d 8, 12 (1967) (general rule is that attorneys' fees may not be awarded in an administrative proceeding, the so-called "American rule"); *Accord, Independent School District No. 709, Duluth v. State, 1991 WL 46559 (Minn. App. 1991)(unpublished)* (Since the Veterans Preference Act is silent on the issue, the Petitioner is not entitled to an award of attorneys fees).

[85] Minn. Stat. §§ 15.471-15.474.